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Roslan Baki v Public Prosecutor

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HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO SDK-42JSK S-1–7 OF 2020
CELESTINA STUEL GALID J
9 NOVEMBER 2021

C

Criminal Law — Rape — Girl below statutory age of consent — Girl mute and hard of hearing — Whether prosecution failed to prove rape charge against accused as it relied wholly upon ten minute video recording of girl being interviewed by police officer as evidence — Whether video recording was unreliable as it raised doubts whether girl's answers were her own or as suggested to her by interviewer — Whether video recording was not tested by cross-examination which defence counsel abandoned when girl could not effectively answer questions put to her — Whether girl's video evidence was uncorroborated — Whether trial court did not err in substituting rape charge with outraging of modesty charge — Whether the same video recording was equally unreliable to prove the substituted charge — Whether accused had raised reasonable doubt in prosecution's case entitling him to an acquittal

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There were two appeals before the court. The first was by the prosecution against the sessions court's acquittal of the accused on a charge of raping a 16-year-old handicapped girl. The other appeal was by the accused against his conviction and sentence by the same court on a substituted charge of assaulting or using criminal force on the girl with intent to outrage her modesty (s 354 Penal Code). The sessions court substituted the rape charge with the outraging of modesty charge pursuant to s 167 of the Criminal Procedure Code at the end of the defence's case after it found that the prosecution's evidence failed to support the rape charge but supported the s 354 offence in respect of which the accused was sentenced to nine years' jail and fined RM10,000 in default ten months' jail. The victim in both the charges was a mute and had difficulty in hearing. The medical evidence at the trial did not conclusively prove that she had been raped. The evidence in support of the rape charge was wholly based on a ten minute video recording in which the child was interviewed by a female police officer, PW7 ('the CIC interview'). That interview comprised the prosecution's entire examination-in-chief of the child. At the trial, PW8 testified through the assistance of an intermediary, PW2, who was a special education teacher. The defence counsel attempted to cross-examine the child but abandoned the cross-examination when the child failed to answer several of the questions posed. The trial court called for the accused's defence to the rape charge but decided at the end of the defence's case it was unsafe to convict based merely on the CIC interview which was not tested in cross-examination.

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Held, dismissing the prosecution's appeal, allowing the accused's appeal and setting aside his conviction and sentence:

(1) The issue was really whether the prosecution's evidence had proven the ingredients of the rape charge so that the defence to the charge was rightly called. Since the examination-in-chief of PW8 was wholly in the form of the ten minute CIC video recording, this court was just as competent as the trial court to evaluate PW8's evidence. An examination of the video recording raised doubts as to whether the answers given by PW8 were her own or whether they were answers suggested by PW7 (see paras 11–12 & 15).

(2) The court took note of the fact that at the material time, PW7 was relatively inexperienced as a child interviewer and had no expertise in dealing with someone with special needs such as PW8. Also when PW7 was asked whether any attempt was made to get a person who was proficient in sign language to assist in the interview, she said 'yes' but added that as PW8 did not know sign language, there was no request made for one. PW7's answer was not justifiable and had to be considered in the light of PW2's own evidence that PW8 was a student of hers. In fact, PW2 was called as the intermediary when PW8 testified at the trial. Thus, there was at least someone who could have assisted in PW7's interview of PW8. But this was not done. The Court also noted that when it came to the identification of the accused, the questions posed by PW7 were in fact suggestive that the perpetrator was a bus driver, which was what the accused was at the material time (see paras 13–14, 18–19 & 23).

(3) Without corroboration it was unsafe for the trial court to convict the accused based on the CIC video recording alone. Although corroborative evidence was not a must in all circumstances and the court could rely on circumstantial evidence, here, there was just no other evidence to support the rape charge. As such, the trial court rightly found that the rape charge was not made out. The prosecution's appeal against the dismissal of the rape charge therefore had no merit (see paras 24–25).

(4) With regard to the accused's appeal, the question was whether the prosecution's evidence supported a charge under s 354 of the Penal Code. Since the CIC video recording was unreliable in supporting the rape charge, it was equally unreliable for the purpose of supporting the s 354 charge. The trial court had also erred in failing to warn itself of the danger of relying upon the uncorroborated evidence of PW5 to convict the accused as PW5 was, by his own admission, an accomplice. At the end of the defence's case, the trial court failed to re-evaluate the prosecution's evidence against that of the defence to determine whether a reasonable doubt had been raised by the accused. The accused had testified that he was never alone with PW8 in the bus and that the doors and windows of

the bus were always open and that when the bus came to pick up the children from the school it would always be parked in an area where there was a lot of human traffic. There was no evidence from the prosecution to suggest that passers-by would not have been able to see what was going on inside the bus. Had the trial court considered these pieces of evidence, it would have concluded that the defence had managed to raise a reasonable doubt in the prosecution's case (see paras 30–31, 40–41 & 43–45).

[Bahasa Malaysia summary

Terdapat dua rayuan di hadapan mahkamah ini. Yang pertama adalah oleh pihak pendakwaan terhadap keputusan mahkamah sesyen yang membebaskan tertuduh atas tuduhan merogol seorang gadis kurang upaya berusia 16 tahun. Rayuan kedua adalah oleh tertuduh terhadap sabitan dan hukumannya oleh mahkamah yang sama kerana menggantikan pertuduhan menyerang atau menggunakan kekerasan jenayah terhadap gadis tersebut dengan niat dengan pertuduhan mencabul kehormatannya (s 354 Kanun Keseksaan). Mahkamah sesyen menggantikan pertuduhan rogol dengan pertuduhan mencabul kehormatan menurut s 167 Kanun Tatacara Jenayah di akhir kes pembelaan selepas mendapati keterangan pihak pendakwaan gagal menyokong pertuduhan rogol tetapi menepati elemen s 354 yang mana tertuduh dijatuhi hukuman penjara sembilan tahun dan denda RM10,000 jika gagal sepuluh bulan penjara. Mangsa di dalam kedua-dua pertuduhan tersebut adalah seorang yang bisu dan mengalami kesukaran untuk mendengar. Keterangan perubatan di dalam perbicaraan tersebut tidak membuktikan secara konklusif bahawa dia telah dirogol. Bukti yang menyokong tuduhan rogol sepenuhnya berdasarkan rakaman video sepuluh minit di mana kanak-kanak tersebut disoal oleh seorang pegawai polis wanita, PW7 ('soalsiasat CIC'). Soalsiasat tersebut meliputi kesemua soalan di dalam pemerikasaan utama pihak pendakwaan terhadap kanak-kanak tersebut. Ketika perbicaraan tersebut, PW8 memberi keterangan melalui bantuan perantara, PW2, yang merupakan seorang guru pendidikan khas. Peguam bela cuba memeriksa balas kanak-kanak tersebut tetapi gagal berbuat demikian apabila kanak-kanak tersebut gagal menjawab beberapa soalan pemeriksaan balas. Mahkamah bicara memanggil tertuduh untuk membela diri terhadap pertuduhan rogol namun memutuskan pada akhir kes pembelaan bahawa adalah tidak selamat untuk mensabitkan berdasarkan hanya pada soalsiasat CIC yang tidak dicabar ketika pemeriksaan balas.

Diputuskan, menolak rayuan pendakwaan, membenarkan rayuan tertuduh dan melepas dan membebaskan tertuduh:

(1) Isunya adalah sama ada keterangan pihak pendakwaan telah membuktikan elemen pertuduhan rogol supaya pihak pembelaan terhadap pertuduhan tersebut dipanggil dengan betul. Memadangkan keseluruhan pemeriksaan utama PW8 sepenuhnya adalah di dalam

bentuk rakaman video soal siasat CIC selama sepuluh minit, mahkamah ini adalah sama kompetennya dengan mahkamah bicara untuk menilai keterangan PW8. Pemeriksaan rakaman video tersebut menimbulkan keraguan sama ada jawapan yang diberikan oleh PW8 adalah dari dia sendiri atau sama ada ianya adalah jawapan yang dicadangkan oleh PW7 (lihat perenggan 11–12 & 15).

(2) Mahkamah mendapati bahawa pada setiap masa material, PW7 agak tidak berpengalaman sebagai penemuduga kanak-kanak dan tidak mempunyai kepakaran untuk berurusan dengan seseorang yang mempunyai keperluan khas seperti PW8. Juga apabila PW7 ditanya sama ada sebarang percubaan dibuat untuk mendapatkan seseorang yang mahir dalam bahasa isyarat untuk membantu dalam soalsiasat tersebut, beliau berkata 'ya' tetapi memberitahu bahawa kerana PW8 tidak tahu bahasa isyarat, tidak ada permintaan yang dibuat untuk tujuan tersebut. Jawapan PW7 adalah tidak wajar dan harus dipertimbangkan berdasarkan keterangan PW2 sendiri bahawa PW8 adalah pelajarnya sendiri. Malah, PW2 dipanggil sebagai perantara apabila PW8 memberi keterangan pada perbicaraan tersebut. Oleh itu, terdapat sekurang-kurangnya seseorang yang boleh membantu dalam soalsiasat PW8 oleh PW7. Tetapi perkara ini tidak dilakukan. Mahkamah juga mendapati bahawa ketika pengecaman tertuduh, soalan-soalan yang dicadangkan oleh PW7 sebenarnya menunjukkan bahawa pelaku adalah pemandu bas iaitu tertuduh (lihat perenggan 13–14, 18–19 & 23).

(3) Tanpa sokongan adalah tidak selamat bagi mahkamah perbicaraan untuk mensabitkan tertuduh berdasarkan rakaman video CIC sahaja. Walaupun bukti sokongan bukanlah satu kewajiban dalam semua keadaan dan mahkamah boleh bergantung pada keterangan keadaan, di sini, tiada keterangan lain untuk menyokong tuduhan rogol tersebut. Oleh itu, mahkamah bicara dengan betul mendapati bahawa elemen tuduhan rogol tidak dipenuhi. Oleh itu, rayuan pihak pendakwaan terhadap penolakan pertuduhan rogol tersebut tidak mempunyai merit (lihat perenggan 24–25).

(4) Berkenaan rayuan tertuduh, persoalannya ialah sama ada keterangan pihak pendakwaan menyokong pertuduhan di bawah s 354 Kanun Keseksaan. Oleh kerana rakaman video CIC tidak boleh dipercayai dalam menyokong tuduhan rogol, ianya juga tidak boleh dipercayai untuk menyokong tuduhan s 354. Mahkamah bicara juga telah terkhilaf kerana gagal memberi amaran kepada dirinya sendiri tentang bahaya bergantung kepada keterangan PW5 yang tidak disokong untuk mensabitkan tertuduh sebagai PW5, dengan pengakuannya sendiri, sebagai seorang rakan sejenayah. Pada akhir kes pembelaan, mahkamah bicara telah gagal menilai semula keterangan pihak pendakwaan terhadap pihak pembelaan untuk menentukan sama ada keraguan

munasabah telah dibangkitkan oleh tertuduh. Tertuduh telah memberi keterangan bahawa dia tidak pernah bersendirian dengan PW8 di dalam bas dan bahawa pintu dan tingkap bas sentiasa terbuka dan apabila bas datang untuk mengambil pelajar sekolah tersebut, bas tersebut akan sentiasa diletakkan di kawasan yang terdapat banyak orang. Tiada keterangan dari pihak pendakwaan yang menunjukkan bahawa orang yang melalui bas tersebut tidak akan dapat melihat apa yang berlaku di dalam bas tersebut. Sekiranya mahkamah bicara mempertimbangkan keterangan-keterangan ini, mahkamah akan dapat menyimpulkan bahawa pihak pembelaan telah berjaya menimbulkan keraguan yang munasabah dalam kes pendakwaan (lihat perenggan 30–31, 40–41 & 43–45).]

Cases referred to

Attan bin Abdul Gani v PP [1970] 2 MLJ 143b; [1969] 1 LNS 12 (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Goh Khiok Phiong v Regina [1954] 1 MLJ 223; [1954] 1 LNS 18, CA (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1, FC (refd)
Lew Cheok Hin v Regina [1956] 1 MLJ 131; [1956] 1 LNS 55 (refd)
Ng Ee v PP [1941] 1 MLJ 180; [1940] 1 LNS 61 (refd)
PP v Mardai [1950] 1 MLJ 33; [1949] 1 LNS 65 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Rattan Singh v PP [1971] 1 MLJ 162; [1970] 1 LNS 132 (refd)
Rex v Baskerville [1916] 2 KB 658 (refd)
Tang Kin Seng v PP [1997] 1 SLR 46, HC (refd)

Legislation referred to

Criminal Procedure Code s 167
Evidence of Child Witness Act 2007 ss 6(1), (8), 8
Federal Constitution art 5(1)
Penal Code ss 354, 376(2)(d)

Mark Kenneth Netto (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Mohd Zairi Zainal Abidin (LCZ Law Firm) for the accused.

Celestina Stuel Galid J:

INTRODUCTION

[1] The accused was originally charged for rape of a special needs child under s 376(2)(d) of the Penal Code. The sessions court held that the prosecution failed to make out the elements of the charge under s 376(2)(d) but on the facts, the learned sessions court judge was satisfied that based on the evidence,

an offence under s 354 of the Penal Code (assault or use of criminal force to a person with intent to outrage modesty) was proven. The sessions court then invoked its power under s 167 of the Criminal Procedure Code to substitute the charge and accordingly convicted and sentenced the accused to nine years imprisonment and a fine of RM10,000 or in default thereof, ten months imprisonment term.

[2] There were two appeals before this court. The first appeal was by the accused against the conviction and sentence and the other, by the prosecution against the acquittal of the accused of the original charge under s 376(2)(d) of the Penal Code. The appeals were heard together.

APPEAL BY THE PROSECUTION

[3] I will first deal with the prosecution's appeal.

[4] This case involved a special needs child victim of 16 years old who had difficulty in hearing and was mute ('PW8'). There was medical evidence led during the trial through PW4 who produced a medical report, exh P15 of her examination of PW8 on 31 January 2018. PW4 testified that PW8 had an old hymen tear at 3 and 9 o'clock positions which she opined was due to blunt object. However, during cross-examination, PW4 agreed that the mere presence of an old hymen tear did not necessarily mean that PW8 has had sexual intercourse and that it could be due to self-masturbation. PW4 further agreed that her examination did not conclusively find that PW8 had been raped. It was thus unsurprising that learned deputy public prosecutor ('DPP') readily conceded that the medical evidence was at best, a neutral piece of evidence.

[5] When asked by this court, learned DPP agreed that the rape charge turned on the primary evidence which was the Child Interview Center ('CIC') video recording of PW8 being interviewed by a female police officer, PW7. The learned sessions court judge had admitted the video recording as exh P13 and the transcript thereof as exh P14B.

[6] PW8 testified through the assistance of an intermediary, PW2, a special education teacher under s 8 of the Evidence of Child Witness Act 2007 ('the ECWA 2007'). After examining PW8 under s 6(8) of the ECWA 2007, the learned sessions court judge was satisfied that PW8 was able to answer intelligently every question posed by the court to her. The prosecution relied on the CIC video recording as PW8's examination-in-chief pursuant to s 6(1) of the ECWA 2007. There was no oral examination-in-chief of PW8 at the trial itself.

[7] The cross-examination was proceeded with but did not get very far as PW8 did not answer some of the questions, leading the learned sessions court judge to suggest to the defence counsel to use direct questions instead. Following an exchange between the court and defence counsel on this issue, learned counsel decided to stop the cross-examination and indicated that he will leave it for submissions.

[8] The issue before this court was whether by the CIC video recording, the prosecution has established beyond reasonable doubt that the accused had raped PW8. The sessions court found that there was a prima facie case so that the accused was called to enter his defence on the rape charge. However, at the close of the defence, the learned sessions court judge was of the view that he was unable to convict the accused of the rape charge based on the CIC video recording alone as it was not tested in cross-examination due to the circumstances stated earlier above.

[9] Learned DPP contended that the sessions court fell into error in concluding that the rape charge was not made out merely on the inability of the defence to properly cross-examine PW8. It was submitted that the right of the accused to have a fair trial under art 5(1) of the Federal Constitution was not violated as there was an intermediary which was allowed by law under the ECWA 2007 and that the defence was not prevented from further cross-examining the witness.

[10] I was of the view that the issue here was not so much of the alleged inability by the defence to continue their cross-examination of PW8. It was the defence's own decision to stop the cross-examination, which they were entitled to do and having done so, must take the risk with it.

[11] However, the issue was really whether the evidence as led by the prosecution has proved the ingredients of the rape charge so that the defence was rightly called to answer.

[12] Usually, the appellate court refrains from disturbing findings of facts by the trial court as it is accepted that the trial judge having the benefit of audio and visual of the witnesses would be in the best position to evaluate the evidence of the witness — see *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457. Here, however, the examination in chief of PW8 was in the form of the CIC video recording. In short, this court stood in the same shoes as the trial court in as far as its ability to evaluate the evidence of PW8.

[13] Now, as noted earlier, the interview in the CIC video recording was by

an interviewer, PW7. At the material PW7 had a three-year experience as a child interviewer after having completed a course on the subject in 2015. PW7 testified that on 24 July 2018, she interviewed PW8 at the CIC IPK Sabah at Kota Kinabalu. The interview in which only PW7 and PW8 were present, lasted more or less ten minutes (lines 3721–3723, NOP).

[14] It was largely suggested in cross-examination of PW7 that she had coached PW8, that PW8's answers were as results of PW7's leading or directly suggesting the answers to PW8 — see lines 3846–3849, 3851–3855, 3857–3860, 3862–3865, 3867–3870, 3872–3875, 3877–3881, 3883–3885, NOP. When asked whether there was an attempt to get a person who was proficient in sign language to assist in the interview, PW7 said 'yes' but as PW8 did not know sign language, there was no request made for one.

[15] Having the benefit of and having examined the CIC video recording myself, I could not but agree with the contention by learned counsel for the accused that there were doubts as to whether the answers given by PW8 were of her own or whether they were from PW7's suggested answers.

[16] Now, before proceeding further on this, the court could not ignore the impassioned statement from learned DPP when he stated 'I supposed if all cases with this nature were to be scrutinised at the level that YA is suggesting then a lot of victims will not have justice ...'. While this court understood where learned DPP was coming from, this court was duty-bound to consider both the rights of the victim and the accused. The burden on the prosecution to prove its case is always beyond reasonable doubt, no matter who the victim or the accused is. The threshold is always the same.

[17] What perhaps could be said for 'cases of this nature' as described by learned DPP and I think I was not wrong to assume that he meant cases involving special victims such as PW8, was that the authorities eg, the police must pay extra attention and effort to ensure that the special victim's story is told in the way that leaves little or no scrutiny merely on account of the special victim's disabilities or disadvantages. This court's observation was not without any basis. For instance, the then de facto Law Minister, Datuk Liew Vui Keong himself alluded to the challenges faced in the recording of statements from child victims of sexual offences (see Parliamentary debates (see DR 22 October 2019 at pp 20–23)) when he stated:

> Datuk Liew Vui Keong: Terima kasih kepada Yang Berhormat Masjid Tanah dalam soalan ini. Seperti yang saya katakan tadi, sememangnya kita menghadapi cabaran yang seperti saya katakan tadi. Jadi, kerajaan telah pun juga menggunakan seksyen 6 Akta Keterangan Saksi Kanak-kanak 2007 yang memperuntukkan bahawa keterangan kanak-kanak boleh dirakam dalam video dan cara-cara bagaimana rakaman video tersebut dimasukkan kepada mahkamah sebagai keterangan.

Jadi, terdapat kekangan bagi penyediaan rakaman video tentang skrip yang diperuntukkan dalam undang-undang. Peningkatan kes kanak-kanak membuatkan this Child Interview Centre tidak dapat dibuat dengan cepat. Mangsa perlu menunggu lama untuk mendapatkan tarikh temu janji. Ini disebabkan pusat CIC adalah terhad dalam negara kita ini. *Jadi, penemu ramah CIC juga tidak terlatih untuk mendapatkan keterangan kanak-kanak mengikut kehendak mahkamah. Jadi, didapati CIC terlalu ringkas dan tidak menceritakan kejadian secara terperinci.* Jadi, ini antara cabaran-cabaran yang telah pun menjadikan satu isu bagi pendakwa raya. (Emphasis added.)

[18] The same problem arose in the present case. How could it be said that such extra attention and effort was made when the interview itself only lasted ten minutes? And when the interview was conducted by PW7 who by all accounts could not be said to be with any expertise in dealing with someone with special needs such as PW8?

[19] PW7's explanation that no sign language intermediary was requested because PW8 was not proficient in sign language was not justifiable and must be considered in the light of PW2's own evidence that PW8 was a student of hers. In fact, PW2 was called as the intermediary when PW8 was called to the stand during the trial. Thus, there was at least someone who could have assisted in PW7's interview of PW8. However, this was unfortunately not done.

[20] As noted earlier, there were doubts as to whether the answers given by PW8 were of her own or whether they were PW7's suggested answers. This was evident in one part of the interview where the following exchanges were recorded:

40. KK Dia ... tu ... tu (meletakkan tangan patung perempuan ke ats kepala Patung lelaki)

41. PT Dia apa ... Nazira pukul?

42. KK Ha.

43. PT Buat begini sama dia? (Isyarat pukul)

44. KK Ha.

[21] In fact, there was no evidence of PW8 having hit the accused on his head but instead, there was evidence by PW5 (see line 2990, NOP) that PW8 was asked by the accused to pull out the grey hairs on his head?

Masa itu, dia (the accused) suruh (PW8) cari rambut putih ...

[22] It was most probable than not that that was what PW8 had meant when she gestured to her head during the interview but PW7 assumed differently. This clearly evidenced that PW7 had on her own, assumed PW8's answer

A according to her understanding but it was a wrong assumption.

[23] Further, the court noted that when it came to the identification of the accused, the questions posed by PW7 were in fact suggestive that the perpetrator was a bus driver — see lines 118–133 of exh P14B. On this, learned B DPP submitted that PW7 had asked the questions the way she did as the accused had been narrowed down as a suspect based on what PW5 had informed the police during the investigation. Respectfully, I found this to be most unsatisfactory as at that material time, PW5's evidence was yet to be tested. It was erroneous for the prosecution to suggest that although PW7's C questions were tailored to show the accused as the suspect, there was nothing wrong in it. To the contrary, the interview by PW7 in such circumstances would not have been a fact-finding mission but instead a fact-confirming exercise contrary to PW7's agreement that it was to help in the investigation (see lines 3823–3825, NOP). With respect, this amounted to a flawed D investigation.

[24] With no other corroboration, I found that it was unsafe for the sessions court to have relied on the CIC video recording alone. Although it is trite that E corroborative evidence is not a must in all circumstances (see *Public Prosecutor v Mardai* [1950] 1 MLJ 33; [1949] 1 LNS 65) and that the court can rely on circumstantial evidence (see *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46; *Attan Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b; [1969] 1 LNS 12, and *Rex v Baskerville* [1916] 2 KB 658), here there was just no other F evidence to support the evidence to establish the rape charge. As such, I formed the view that the sessions court was correct in finding that the rape charge was not made out albeit the sessions court's decision was based on the ground that it did.

G **[25]** Accordingly, I found no merits in the appeal by the prosecution against the dismissal of the rape charge and in the circumstances, dismissed the appeal by the prosecution.

APPEAL BY THE ACCUSED

H

[26] Next, I will deal with the appeal by the accused against the conviction and sentence on the substituted charge under s 354 of the Penal Code for which the learned sessions court judge had exercised his discretion pursuant to s 167 of the Criminal Procedure Code.

I

[27] It was submitted for the accused that the sessions court erred in so doing, that had it been true that the evidence disclosed of an offence under s 354, the court ought to have either substituted the charge or proffered an additional charge against the accused at the end of the prosecution's case.

[28] Cussen J in *Ng Ee v Public Prosecutor* [1941] 1 MLJ 180; [1940] 1 LNS 61 discussed on the power of substitution of a conviction to be exercised by the court, holding as follows:

> The power of substitution of a conviction under a different provision of the law for the conviction found by the magistrate is to be exercised with great caution, and only where it is clear beyond all doubt, from the nature of the offence and the record of evidence in the case, that to do so can in no way prejudice the case of the accused. It must be clear that if the substituted charge had in fact been the original charge the proceedings at the trial would have taken the same course, the evidence recorded been the same — that the prosecution evidence would have been unchanged (substantially) and the accused's evidence the same.

[29] In *Lew Cheok Hin v Regina* [1956] 1 MLJ 131; [1956] 1 LNS 55, Taylor J, summarised the test to be applied before an appellate court could exercise the power to alter a conviction as follows:

> There are two main tests. First, the facts must be such that the unframed charge was available from the start and could have been framed and tried concurrently under s 165; secondly, the evidence must have been presented in such a way as to raise all the same issues of fact as would have been raised had the unframed charge been framed and trial claimed on it. Not only must the evidence for the prosecution be the same but the court must be satisfied that the evidence for the defence would also have been the same.

[30] Following the test laid out in *Lew Cheok Hin v Regina*, the question for this court was whether there was evidence presented by the prosecution which would have supported a charge under s 354 had it been framed and the accused was tried on the said charge. In addition, this court was also to consider whether the defence would have differed had the s 354 charge been framed earlier or at least at the end of the prosecution's case. To this, it was of significance that it was not part of the grounds of appeal that the accused was prejudiced by the substitution of the charge or that the defence would have been different had it been that the charge was substituted at the end of the prosecution's case. The learned sessions court judge relied on the evidence of PW5 in his decision that the offence under s 354 was made out. Scrutinising PW5's evidence as apparent in the record of appeal, I found that the learned sessions court judge did not err in concluding that PW5's evidence would have supported the charge under s 354. As such, I did not find that the learned sessions court judge erred in substituting the charge albeit at the end of the defence case.

[31] As to the merits of the appeal by the accused, firstly, given this court's finding on the unreliability of the CIC video recording, this court agreed with the submissions by learned counsel for the accused that likewise it was unreliable for the purpose of the charge under s 354.

[32] As for the evidence relied on by the learned sessions court judge in finding the accused guilty of the s 354 charge, the learned sessions court judge primarily accepted the evidence of PW5 whom his honour found to be a 'competent witness who knows the duty to tell the truth'.

[33] The learned sessions court judge made the following findings on PW5's evidence:

> I find that there is sufficient evidence of outage of modesty. This act of outrage of modesty was testified by one witness who is PW5 when PW5 had witnessed something very important for the consideration of the court in this case. That the accused person had at one time in a date which he couldn't remember but he remember it was 2017, that the accused had asked the victim (...) to pull out his white hair and when the victim was doing so the accused then fondled the victim's breast. According to PW5 the accused had caused the victim to be afraid.
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> 61. From this testimony it is very clear that an act of outrage of modesty had taken place with a clear witness. PW5 was very strong and unflinching in this part of the testimony and he was unshaken even during the cross
>
> ...

[34] It was submitted for the accused that the learned sessions court judge erred in failing to warn himself of the uncorroborated evidence of PW5 who was an accomplice. Indeed, that is the law — see *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162; [1970] 1 LNS 132. But was PW5 an accomplice?

[35] In the case of *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481, the Federal Court explained who can be said to be an accomplice as follows?

> The question that arises is whether on these facts he can be termed as an accomplice. In *Davies v Director of Public Prosecutions* [1954] 1 All ER 507 it was held that persons who are *particeps criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact, are accomplices. In explaining the role played by these categories of persons the *Law of Evidence* by Woodroffe and Amir Ali (16th Ed) (Vol 4) says at p 3434–5:
>
> > A principal of the first degree is one who actually commits the crime; a principal in the second degree is a person who is present and assists in the perpetration of the crime; an accessory before the fact is one who counsels, incites, connives at, encourages or procures the commission of a crime; everyone is an accessory after the fact to a felony who, knowing a felony to have committed by another, receives, comforts or assists him in order to enable him to escape from punishment; or rescues him from arrest for the felony; or having in custody for the felony, intentionally and voluntarily suffers him to escape; or apposes his apprehension.

[36] The court in *Goh Khiok Phiong v Regina* [1954] 1 MLJ 223; [1954] 1 LNS 18 had said a trial judge should ask himself, that is, 'Is there any evidence upon which I can properly rule that the witness was a participant in the offence?'.

[37] PW5 was also a special needs child, 16 years old at the time when he testified at the trial. There was no complaint about the competency test administered by the sessions court before PW5's evidence was recorded. His evidence was as narrated by the sessions court which this court will not repeat herein.

[38] However, there was one part of the evidence of PW5 which appeared to have escaped scrutiny by the learned sessions court judge and that was the suggestion by learned counsel for the accused that PW5 was also alleged to have fondled PW8's breast. PW5 was steadfast in denying the questions on this issue during cross-examination but in re-examination, the following exchange ensued (see lines 3352–3358, NOP):

> Q Refer NOP line 3286–3288:
>
> Q: Saya katakan kepada kamu yang mana Azlih tahu Azlih buat salah sebab buat begitu dengan (...), setuju atau tidak?
>
> A: Ya.
>
> Sila jelaskan kepada Azlih jawab ya kepada soalan peguam.
>
> A: Sebab saya ada terpegang buah dada si (...) tapi si pakcik yang suruh.

[39] In fact, that PW5 was an accomplice was even suggested by the prosecution in the cross-examination of the accused (see lines 2097–2300, NOP). In addition, PW2 testified that in October 2017, PW8 complained to her about someone having fondled her breasts and that when PW2 asked who it was, PW8 pointed to PW5 (see lines 248–257, NOP).

[40] Thus, I found merits in the contention by learned counsel for the accused that the sessions court erred in failing to warn itself of accepting PW5's evidence without more. In so concluding, I have considered the submissions by learned DPP that this court ought to be slow in disturbing the finding of facts by the sessions court on the evidence of PW5. With respect, as noted earlier, there was a glaring absence in the consideration of PW5's evidence by the learned sessions court judge. Notwithstanding that PW5 may have withstood the lengthy cross-examination, the sessions court was still bound to make a finding on his credibility especially given that by his own admission, PW5 was an accomplice to the accused and that he himself was alleged to have molested PW8 by none other than the prosecution's own witness (PW2). The failure to do so, in my view, rendered the finding of the sessions court to be incomplete

A and liable to be corrected on appeal. The question which ought to have been asked given the allegations against PW5 was, whether PW5 was motivated to deflect the attention from himself when he pointed the finger at the accused. This was unfortunately not answered by the sessions court.

B **[41]** It is the duty of the trial court to re-evaluate the prosecution's evidence at the end of the defence case before it can come to a conclusion whether reasonable doubt has been raised by the defence evidence. Unfortunately, here the sessions court merely summarised the evidence led by the defence without considering them against the prosecution's evidence.

C

[42] As may be remembered the key evidence from PW5 which persuaded the sessions court was his following narration of an incident in 2017:

D Q: Cuba ceritakan kepada Mahkamah apa yang kamu nampak berlaku di antara (...) dan pakcik bas sekolah?

A: Masa itu, dia suruh si (...) cari rambut putih. Lepas itu saya nampak, saya terkejut dia kasih masuk dia punya tangan di dalam baju si (...). Lepas itu dia pegang buah dada si (...). Saya pun terkejut. Itu sahaja.

E

[43] The accused testified in his defence that he was never alone with PW8 in the bus and that the bus was not enclosed as it was without air-conditioning and that it was parked where people could observe it. DW2, a mother of another special needs child testified that her daughter also took the bus driven F by the accused and that she (DW2) always followed her daughter whenever she was picked up to and from school by the accused in 2016 and 2017. DW2 testified that PW8 was also one of the passengers of the bus driven by the accused. DW2 said that the door and windows of the bus were always open as it was hot (inside). While waiting for the children ie, the passengers, the bus G would be parked at the side of the fence near the bus station where there were hawkers selling food, people coming to pick up their children and security guards. In cross-examination, DW2 said that she was always with her daughter in the bus in 2016 and 2017 unless there was heavy rain or when her daughter H was unwell.

[44] The photographs of the bus were tendered as evidence as exh P9(1–21). They clearly showed that the windows of the bus were not tinted and the inside was visible from the outside. In any event, there was no evidence led by the I prosecution to suggest that people on the outside would not have been able to see what was going on inside the bus even in the broad daylight. Except for the suggestion by the prosecution that DW2's daughter and hence, DW2 herself could have been absent on the very day that PW5 saw the accused committing the offence in 2017, there was no suggestion that the people around the area

where the bus was parked as testified by the accused and DW2 could not have observed what was going on.

[45] Had the sessions court considered these evidence, it would have come to a conclusion that the defence did manage to raise reasonable doubt in the prosecution's case. If the prosecution could not pinpoint with precision the actual date when PW5 allegedly saw the accused committing the offence, with respect, DW2 likewise could not be faulted for not being able to pinpoint with precision the actual date when she was not on the bus either so as to suggest that that was the very day when the offence was committed. With respect, the burden is always on the prosecution and the evidence led by the defence was sufficient to my mind, to have raised reasonable doubt on the evidence of the prosecution as they were presented.

[46] Conclusively, I found that there was ground for an appellate intervention and I therefore set aside the conviction and sentence against the accused for the charge under s 354 of the Penal Code. The appeal by the accused was allowed, the conviction and sentence by the sessions court were therefore vacated.

Prosecution's appeal dismissed; accused's appeal allowed and conviction and sentence set aside.

Reported by Ashok Kumar